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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1965

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS AND STATION EMPLOYEES, et al.,
Petitioners,

No. 750 v.

FLORIDA EAST COAST RAILWAY COMPANY,
Respondent.

UNITED STATES OF AMERICA
Petitioner,

No. 782 v.

FLORIDA EAST COAST RAILWAY COMPANY,
Respondent.

FLORIDA EAST COAST RAILWAY COMPANY,
Petitioner,

No. 783 v.

UNITED STATES OF AMERICA
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF FLORIDA EAST COAST RAILWAY COMPANY

GREGORY S. PRINCE
PHILIP F. WELSH
Transportation Bldg.
Washington, D.C.
JONATHAN C. GIBSON
C. GEORGE NIEBANK, JR.
80 E. Jackson Blvd.
Chicago, Illinois 60604
Attorneys for Association of American Railroads.
Amicus Curiae

McCORMICK & HENDERSON, INC., CHICAGO

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This brief *amicus curiae* is filed by the Association of American Railroads pursuant to Rule 42 (2) of the Rules

of this Honorable Court. It is accompanied by written consent to its filing by the Solicitor General of the United States, by the Brotherhood of Railway Clerks and other labor organizations, and by Florida East Coast Railway, being all of the parties to the case.

I. INTEREST OF AMICUS CURIAE

The Association of American Railroads is a voluntary, unincorporated, nonprofit organization composed of member railroad companies operating in the United States, Canada, and Mexico. These railroad companies operate more than 95 per cent of the total railroad mileage and have approximately 98 per cent of the total operating revenues of all railroads in the United States. The activities of the Association cover a wide range, having to do with such matters as research, operations, car service, safety, public relations, accounting, statistics, law, and federal legislation and regulation, insofar as those matters require joint handling in the interest of safe, adequate and efficient railroad service to the public.

The Association is the joint representative and agent of these railroads in connection with federal legislation and legal matters of common concern to the industry as a whole. It has an interest in significant interpretations of federal legislation that will apply generally to all of its members. The issues raised in the present case relating to the proper construction of the Railway Labor Act are of vital importance to the entire railroad industry. The Court of Appeals has construed and applied the Act so as to overturn a practice followed by the railroads for generations and never questioned before.

II. STATEMENT OF THE CASE

The issue with which we are primarily concerned depends on very few bare facts—a carrier confronted with a strike by its employees has in its own defense exercised its right to resort to self-help and restored such of its operations as it could through use of supervisory and replacement employees working temporarily under rates of pay, rules and conditions different from those provided in collective bargaining agreements in force prior to the work stoppage.*

The temporary character of departures from the provisions of collective agreements is to be emphasized. We are not here contending that railroads are free under the Railway Labor Act to impose unilaterally permanent changes in working conditions to extend beyond the life of the strike without resort to the major dispute processes of the Act. In our view, any temporary conditions necessitated by a carrier's resort to self-help in defense against the self-help measures invoked by striking employees would immediately cease to be operative upon termination of the strike.

Since the opinion of the lower court here for review, *Florida East Coast Ry. Co.* v. *United States,* 348 F.2d 682 (5th Cir., 1965), does not itself enunciate in any detail the bases for its holding but relies for the law of the case on its earlier decision in *Florida East Coast Ry. Co.* v. *Brotherhood of Railroad Trainmen,* 336 F.2d 172 (5th Cir., 1964), it is necessary to turn to the latter to find the rulings of law to be reviewed by this Honorable Court.

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* To avoid tedious repetition of "rates of pay, rules and working conditions," we shall hereafter refer only to "conditions" or "working conditions," intending in each instance that this word or phrase be understood to include the entire scope of "rates of pay, rules, and working conditions."

As we read that case, the decision of the court as applied to the strike involved here can be summarized as follows:

> Florida East Coast could not lawfully institute the temporary changes in working conditions it placed in effect on February 3, 1963, when it undertook to resume operations on a limited scale in the face of the strike of non-operating unions In doing so, it violated Section 6 of the Railway Labor Act. 336 F.2d at 180. Notwithstanding the strike collective bargaining agreements between the unions and the carrier effective prior thereto continue in full force and effect during the strike except to the extent that temporary changes therein may, as hereafter stated, be permitted by a court. *Ibid.* Also notwithstanding the strike called by the non-operating unions and the refusal to work by employees represented by them at the time of the strike, those unions continue to be the bargaining representatives of employees who ignore the strike and work in the non-operating crafts or classes while the strike is in progress. *Ibid.*
>
> When faced with a strike, a carrier is free to resort to self-help—that is, to operate or attempt to operate regardless of the strike. 336 F.2d at 181. But this does not mean that otherwise applicable collective bargaining agreements can be ignored; "self-help" is "help which is reasonably needed to meet the impasse of a railroad desiring to run and unions unwilling to furnish workers." *Ibid.* A carrier confronted by a strike can depart from working conditions specified in collective agreements, but it must present such temporary changes to a federal District Judge and prove that requested changes are "reasonably necessary" to make a "meaningful reality" of its "right to continue to operate." 336 F.2d at 182.

The railroad industry represented by the Association of American Railroads agrees with Florida East Coast that the Court of Appeals erred in construing the Act to require carriers to adhere to prestrike conditions during a work stoppage.

III. QUESTION PRESENTED

A number of questions have been raised by the parties. We do not propose to deal with whether the United States has standing to maintain its suit for injunctive relief, or whether the National Railroad Adjustment Board has primary jurisdiction of the subject matter of this suit. We shall direct our attention to a single subject:

> Does the Railway Labor Act severely curtail the right of self-help which a carrier is entitled to exercise when faced with a strike by its employees by compelling it to adhere to and apply all provisions of collective bargaining agreements in force prior to the strike except to the extent that temporary relief from some of such provisions may be granted by a court on a showing by the carrier that relief therefrom is "reasonably necessary?" Or is a carrier subject to the Railway Labor Act, when faced with a strike by its employees, entitled in its exercise of its right of self-help to operate or attempt to operate as best it can for the duration of the work stoppage under such temporary working conditions as it alone deems necessary and which are not otherwise unlawful?

IV. SUMMARY OF ARGUMENT

A. Carriers subject to the Railway Labor Act are entitled to resort to self-help in defense against a strike called in connection with a major dispute in which the processes for handling such disputes prescribed by the Act have been exhausted. *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 372 U.S. 284, 291 (1963); *Pan American World Airways* v. *Flight Engineers International Assn.*, 306 F.2d 840, 846 (2d Cir., 1962).

B. The self-help which carriers can exercise in defense against a strike must be construed in light of their common-law and statutory duty to provide transportation service. The fact that their employees refuse to perform their duties is no excuse for a failure or refusal to serve. *Illinois Central R. Co.* v. *International Ass'n of Machinists*, 190 Fed. 910 (E.D. Ill., 1911); *Stephens* v. *Ohio State Telephone Co.*, 240 Fed. 759 (D.C. Ohio, 1917); *Farmers Grain Co.* v. *Toledo, Peoria & Western R.R.*, 66 F.Supp. 845 (D.C. Ill., 1946); *Farmers Grain Co.* v. *Toledo, Peoria & Western R.R.*, 158 F.2d 109 (7th Cir., 1947).

C. It has been a matter of practice in the railroad industry for many years for carriers to operate or attempt to operate in the face of a strike as best they can under working conditions made temporarily necessary by the work stoppage, and without reference to whether such working conditions complied with the requirements of collective agreements effective prior to the strike.

D. Collective bargaining agreements are contracts. *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 334-336 (1944). When unions strike carriers with which they have collective agreements in an effort to compel acceptance of demands for changes, they are neces-

sarily repudiating those agreements. Under the common law of contracts, the agreements are thereafter unenforceable against the carriers—they are suspended for the duration of the strike. 5 WILLISTON, CONTRACTS §§ 1301, 1302 (Williston and Thompson rev. ed. 1937). The common law of contracts is applicable to labor agreements. *United Electrical Workers* v. *National Labor Relations Board*, 223 F.2d 338, 341 (D.C. Cir., 1955), cert. denied 350 U.S. 981 (1956), rehearing denied 351 U.S. 915 (1956).

E. The Railway Labor and National Labor Relations Acts are based on a common federal policy of labor relations. *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 346 (1944); *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U.S. 514, 524-525 (1941). In numerous cases arising under the National Labor Relations Act, this Court and Courts of Appeals have emphasized that parties to labor disputes are not to be limited in their resort to self-help except as clearly indicated by Congress. *National Labor Relations Board* v. *Insurance Agents Union*, 361 U.S. 477 (1960); *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300 (1965); *Hawaii Meat Co.* v. *National Relations Board*, 321 F.2d 397 (9th Cir., 1963); *National Labor Relations Board* v. *Abbott Publishing Co.*, 331 F.2d 209 (7th Cir., 1964).

F. In limiting the right of carriers subject to the Railway Labor Act to operate or attempt to operate during a strike, the Court of Appeals has construed the Act contrary to its stated purpose of attempting to avoid interruptions to commerce and to operations of carriers. In allowing unions to repudiate collective agreements completely during strikes, while at the same time requiring carriers to abide by the provisions of such agreements, the Court of Appeals has failed to accord the parties the equality which it was a purpose of the Act to establish.

G. The Railway Labor Act, in its provisions involved in this case, is a criminal statute. As such it should be strictly construed and the actions of Florida East Coast complained of held not contrary to the Act unless they were plainly and unmistakably made unlawful by Congress. *United States* v. *Resnick*, 299 U.S. 207, 209-210 (1936); *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952). This strict construction must be applied here even though this is a civil case because substantively the Act must mean the same whether it is sought to enforce it in a civil action or a criminal prosecution. The Act is not so clear that this Court could sustain a criminal charge against Florida East Coast, so the interpretation of the Court of Appeals must be rejected.

H. The construction of the Act by the Court of Appeals rests on one part of one section taken out of context. Considered in context with other relevant sections, the words of the Railway Labor Act tend to affirm rather than condemn the right of carriers to disregard collective agreements with striking unions.

I. Nothing in the legislative history of the Railway Labor Act affirmatively supports the construction given it by the Court of Appeals. Negatively, however, that history tends to contradict the court. There is no indication that Congress intended to overturn the practice of railroads operating or attempting to operate during strikes. Nor is there any evidence that the unions ever complained to Congress about the practice.

J. While the striking unions remain the collective bargaining representatives of the crafts or classes of employment they represented prior to the strike as long as the strike lasts or unless and until they are replaced by other

unions, they have no enforceable collective agreements during that period. They caused the suspension of those agreements by their act of striking. In the absence of enforceable collective agreements, carriers are free for the duration of the strike to establish working conditions in individual contracts with employees who work during the strike.

K. The legal consequences of the decision of the Court of Appeals are such as to indicate that that decision must be reversed.

L. The actual experience of Florida East Coast does not show that the result of the decision of the Court of Appeals is practical or reasonable. That the carrier was able to restore pre-strike working conditions after operating under different conditions for some 21 months, does not tend to prove that it could have provided the service its duty requires if it had been compelled to apply those conditions from the outset of the work stoppage. The uncontradicted record shows the contrary.

V. ARGUMENT

Does the Railway Labor Act, as the courts below have held and the government and unions here contend, forbid a carrier faced with a strike to make temporary changes for the duration of the work stoppage in working conditions contained in collective bargaining agreements with the striking unions without first exhausting the major dispute procedures prescribed by the Act? Or does the Act, as Florida East Coast and the railroad industry contend, leave a carrier faced with a strike free, without following the statutory major dispute processes, to make such temporary changes in conditions for the duration of the work stoppage as it thinks necessary to its exercise of self-help which are not otherwise unlawful? Put another way—is self-help under the Railway Labor Act really a one-way street open only to unions?

The Act was not adopted in a vacuum but against a background of many years' experience in dealing with railroad labor problems. Erdman Act of 1898, 30 Stat. 424; Newlands Act of 1913, 38 Stat. 103; Adamson Act of 1916, 39 Stat. 721; Title III of the Transportation Act of 1920, 41 Stat. 469.

The Act was superimposed on a system of collective bargaining in which the parties were free, except to the extent specifically or by necessary implication restricted, to include in collective agreements any provisions they wished. Under the Act itself, agreement is not compelled, *Virginian Railway* v. *System Federation No. 40,* 300 U.S. 515, 548 (1937), and the law, except for minimal limitations, does not concern itself with the content of collective agreements. *Terminal Railroad Assn.* v. *Brotherhood of Railroad Trainmen,* 318 U.S. 1, 6 (1943).

When the Railway Labor Act became law nothing restricted the right of carriers to operate during strikes under temporary conditions designed to facilitate their resort to self-help. What then was the intent of Congress in the Act? Did it mean to overturn or limit this accepted right of the carriers?

We submit that the law, common sense, and elementary concepts of equity require that this Court construe the Railway Labor Act as we herein urge. Indeed, if this construction is not adopted, we perceive serious constitutional problems under the due process clause of the Fifth Amendment to the Constitution of the United States.

A. When Confronted by Strikes, Rail Carriers Are Entitled to Resort to Self-Help; the Railway Labor Act Must be Construed to Give a Sensible Scope to the Self-Help Carriers Can Utilize

The Court of Appeals did not question that Florida East Coast was entitled to resort to some form of self-help when confronted by a strike of its non-operating employees on January 23, 1963. The dispute over which the strike was called grew out of a demand by those unions for an increase in the rates of pay provided in the collective agreements between them and the carrier. It was by definition a major dispute, *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 723 (1945), and it had been progressed through all the major dispute procedures required by the Railway Labor Act without settlement. The processes of the Act having been exhausted, the parties—including the carrier—were free, as this Court squarely ruled in *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 372 U.S. 284, 291 (1963), to resort to self-help. The Second Circuit returned the same ruling in *Pan American World Airways* v. *Flight Engineers International Assn.*, 306 F.2d 840, 846 (2d Cir., 1962).

Knowing that a carrier can resort to self-help under strike conditions is one thing. What is meant by "self-help" in this context is something quite different. Congress did not define it for us and we are left to do the best with what we have.

In seeking to ascertain the intent of Congress, we must approach the Railway Labor Act from the basis of the well settled canon of construction which directs that acts of Congress must be construed sensibly, so as to effectuate the legislative intent and avoid absurd results. *Haggar Co.* v. *Helvering,* 308 U.S. 389, 394 (1939); *Armstrong Co.* v. *Nu-Enamel Corp.,* 305 U.S. 315, 332-333 (1938); *Alexander* v. *Cosden Co.,* 290 U.S. 484, 496 (1933); *Burnet* v. *Guggenheim,* 288 U.S. 280, 285 (1932); *Sorrells* v. *United States,* 287 U.S. 435, 446 (1932); *United States* v. *Katz,* 271 U.S. 354, 357 (1926); *Lau Ow Bew* v. *United States,* 144 U.S. 47, 59 (1892).

B. Any Concept of the Self-Help Carriers Are Entitled to Exercise Under Strike Conditions Must Take Into Account their Common-Law and Statutory Duties to Furnish Transportation Services

This case does not involve the rights of a manufacturer, a distributor, a builder, or a seller of goods. We do not mean to disparage the significance of their rights or interests, but at stake here are not only the rights and interests—but also the duties—of common carriers by rail, for they are under obligations imposed both by the common law and by Sections 1(3), 1(4), 1(11), and 8 of the Interstate Commerce Act, 49 U.S.C. §§ 1(3), 1(4), 1(11), 8, to provide shippers with transportation service on a reasonable request therefor. Consequently, in a dispute like this between railroads and unions representing their employees, "More is involved than the settlement of a

private controversy without appreciable consequences to the public." *Virginian Railway* v. *System Federation No. 40*, 300 U.S. 515, 552 (1937). The public may be abstractly concerned with preservation of an orderly scheme for settlement of railroad labor disputes, but it is directly and immediately concerned with preservation of rail service to the maximum extent reasonably possible notwithstanding a strike.

This duty to serve cannot be excised from the carriers' right to take self-help measures under strike conditions. It means to us that the matter of resort to self-help extends beyond being a "right" because it includes certain elements of duty. In other words, carriers have not only a "right" to resort to self-help under strike conditions but are required to make reasonable efforts to exercise that right.

This duty has been recognized for many years in common carrier and public utility cases. In *Illinois Central R. Co.* v. *International Ass'n of Machinists*, 190 Fed. 910 (E.D., Ill., 1911), a carrier sought and was granted injunctive relief against acts of trespass committed by its striking employees. Its common carrier obligations were an important consideration to the court which granted relief:

> ". . .[T]he railroad company . . . has certain duties to perform of a public nature, and in which all the people are interested. It is bound to carry the United States mail with safety and dispatch. It is bound to carry interstate passengers and freight in conformity to the laws of the United States. It is bound to keep its cars, engines, and safety devices in good order, in obedience to the laws of the United States. And, this being an absolute duty, nothing can be interposed as a defense for a failure in that regard, and the penalties of the law thereby be avoided." 190 Fed. at 912.

In *Stephens* v. *Ohio State Telephone Co.*, 240 Fed. 759 (D.C. Ohio, 1917), patrons of a telephone company sought injunctive relief to compel the company to provide the service required of it by the law. The company's defense was that a strike by its employees prevented it from giving service. Pertinent here was the question raised whether a federal cause of action existed under the circumstances. The court said that Congress intended in the Interstate Commerce Act to classify telephone companies with "railroads and other transportation common carriers." 240 Fed. at 767. It held that the complaint presented a controversy under the laws of the United States. *Id.*, at 769. The court also expanded on the company's duty to provide service despite a strike by its employees:

> "The Ohio State Telephone Company is a public utility. Its first duty is to serve the public. Its work meets a vital public necessity. The right of its striking employes to 'interfere by lawful means' with its business does not mean a right to cripple performance by it of its duties to the public, if it can find people willing to work for it. If labor can be had, the company must employ, and the strikers must permit it to employ and use, labor to perform its public duties, and any one willing to work for it must be allowed by everybody entire freedom to do so. The public, having a great need for services of the character offered by this public utility, has an enforceable right to demand these conditions of both the company and of those associated in controversy with it. This court is empowered to say to the company that it must meet its public obligations. Coupled with that power of the court is the power and duty of laying its prohibitive and punishing hand upon any one whose willfully unlawful conduct tends to render abortive the exercise of that power. We can no more say to the company that it must yield to the demands of its striking employes than we can

say to them that they must meet the company's exactions. The controversy must be carried on, on both sides, without substantial detriment to the company's public service." 240 Fed. at 775

The *Illinois Central* and *Stephens* cases were cited in *Farmers Grain Co.* v. *Toledo. Peoria & Western R.R.*, 66 F.Supp. 845 (D.C., Ill. 1946), which illustrates our precise point even though it was a by-product of one of the most dismal chapters in railroad labor relations history. A group of shippers filed suit against a strike-bound railroad and the striking unions, seeking an injunction to compel restoration of rail service and appointment of a receiver. Reiterating the paramount public interest in that service, the District Court ruled that the railroad was "under an absolute duty to operate," 66 F.Supp. at 861, and appointed a receiver.

The Court of Appeals, while reversing the appointment of a receiver, said that a mandatory injunction would lie to compel the carrier to operate in the face of a strike if the order protected the carrier from interference. *Farmers Grain Co.* v. *Toledo, Peoria and Western R.R.*, 158 F.2d 109, 116, 118-119 (7th Cir., 1947). This Court granted certiorari but later directed that the judgment of the Court of Appeals be vacated and the case remanded to the District Court or be dismissed as moot. *Farmers Grain Co.* v. *Brotherhood of Locomotive Firemen*, 332 U.S. 748 (1947).

A carrier's duty to serve despite labor difficulties is shown under different circumstances in *Burlington Transportation Co.* v. *Hathaway*, 12 N.W. 2d 167 (S.C. Iowa, 1943). There it was held that a common carrier by motor vehicle was entitled to an injunction to restrain striking employees of a shipper from interfering with performance by the carrier's employees of the carrier's duty to serve the shipper. The court cited a case from Washington State

in which a motor carrier's operating permits had been temporarily suspended on complaint of a patron for refusal to send trucks through a picket line at the patron's place of business because of a threat of the union that the carrier's employees would strike if that were done. *Consolidated Freight Lines* v. *Department of Public Service,* 200 Wash. 659, 94 P.2d 484 (S.C. Wash., 1939).

The leading case of recent years dealing with the common problem of service to a strike-bound shipper is *Minneapolis & St. Louis Ry. Co.* v. *Pacific Gamble Robinson Co.,* 215 F.2d 126 (8th Cir., 1954). The carrier there sought to establish the reasonableness of its failure to switch and furnish cars to a struck plant through evidence that its regular employees and its supervisors refused to serve the plant in question because the striking union had an unsavory record of violent retaliation against those who did not honor its picket line, coupled with a long memory. Emphasizing the carrier's duty to render service the Court of Appeals said:

> "While the law, of course, exacts only what is reasonable from a carrier, *Midland Valley R. Co.* v. *Barker,* 276 U.S. 482, 485 . . ., it does, in the general public interest, require of every carrier 'the utmost fairness and good faith on its part in dealing with the shipper and in the discharge of its duties to him,' *Chicago & E.I.R. Co.* v. *Collins Produce Co.,* 249 U.S. 186, 193 . . . ." 215 F.2d at 134.

The court gave a significant answer to a contention by the railroad that its employees could lawfully refuse to cross the picket line at the struck plant Even assuming that the carrier was correct in that claim, it ruled that this neither meant nor implied that "the carrier is left without any duty to make any effort whatsoever to furnish service in such a situation." 215 F.2d at 137.

To the same end, see *General Drivers* v. *American Tobacco Co.*, 264 S.W. 2d 250 (Ct. Apps., Ky., 1954), and *Merchandise Warehouse Co.* v. *A.B.C. Freight Forwarding Corp.*, 165 F.Supp. 67 (D.C. Ind., 1958).

When railroad employees refuse in such cases to perform their regular assignments and provide service to a strike-bound facility of a shipper, their action constitutes a form of work stoppage directed against the carrier itself. The result—albeit on a small scale—is directly analogous to that of full-blown strike. If a carrier is required by law to exert every reasonable effort to serve strike-bound shippers notwithstanding the failure or refusal of its regular employees to give such service, it must also be under a similar duty to give service when its regular employees, in the course of a strike of their own, refuse to serve any shippers whom they would serve but for the strike.

The case at bar provides an example of enforcement of the duty of a struck carrier to provide service notwithstanding a work stoppage. Florida East Coast resumed passenger service on August 3, 1965, at the order of the Commerce Commission of the State of Florida. To be sure, this was some months after the carrier had reinstituted pre-strike working conditions at the order of the courts below. There is no connection, however, between the working conditions being applied by the carrier and the power of the state to compel it to provide service. That power would exist—if it exists at all—no matter what working conditions were being applied by the carrier.

This common-law and statutory duty of a common carrier to make reasonable efforts to provide service whether its employees are disposed to or not stands side-by-side with the common law right of the carrier sanctioned by the

Railway Labor Act to resort to self-help in defense against strike measures taken by its employees. To the extent that a carrier's right to self-help is limited by restrictions on its efforts to operate during a strike, its duty to render service as a common carrier is impaired.

This raises the familiar problem of resolving an apparent conflict between two seemingly opposed statutory objectives. But the courts below here actually created the problem where none existed before by their interpretation of the Railway Labor Act as requiring carriers to apply provisions of pre-strike collective agreements notwithstanding the intervention of a work stoppage. The interpretation urged by Florida East Coast and the railroad industry would, on the other hand, obviate the problem. Under the settled principle of statutory construction preferring an interpretation which avoids the problem without impairing the effectiveness of either of two policies asserted to be in conflict, *Allen-Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797, 806 (1945), the opinion of the Court of Appeals in the case at bar should be rejected.

The duty of common carriers to provide service is relevant not only to an appraisal of the self-help they are entitled to exercise under strike conditions but also to the extent to which employees are authorized to strike. That is, by the act of accepting positions with carriers, employees must be taken to have assumed at least some aspects of the carriers' common-law and statutory duty to provide transportation service. This does not necessarily mean that they cannot strike but it does mean that as a part of their right to strike they cannot fairly expect to be able to shut down the carriers' operations altogether and thereby deprive the public completely of essential rail transportation services it is entitled by law to receive from the

carriers. A more expansive view of the right to strike under the Railway Labor Act would be to extend an unwarranted preference to the policies of that Act at the expense of the policies of the common law and the Interstate Commerce Act.

C. The Court of Appeals has Construed the Railway Labor Act to Make Unlawful a Settled and Accepted Practice in the Railroad Industry

Without benefit of citation to source materials or the record, the government asserts flatly that, "We note, however, that FEC is the only railroad carrier to attempt to operate during a strike in the last five years." Petition for Certiorari, No. 782, 14-15.

This is not so. The fact is that in the last five years there have been a number of strikes in which railroads have attempted to operate during a strike with supervisory personnel with varying degrees of success and, in some instances, with replacement employees. As a rule, these strikes were of comparatively brief duration so that operations were effected by supervisory personnel alone because there was no time to hire replacements.

Within the past 18 months or two years, there have been several rail strikes—again, most of them short-lived—in which carriers were able to continue to provide some service with supervisory personnel. For example, Santa Fe had three strikes in the calendar year 1965 alone. In each instance, it was able to continue at least limited service through use of supervisors and some employees who chose to work rather than strike. The Birmingham-Southern had similar experience during an 11-day strike from November 11 to November 22, 1965. The Port Terminal Railroad Association of Houston, an essential switching facil-

ity, was subjected to a 47-day strike from December 16, 1964, to February 1, 1965. It was able, however, to provide needed service to shippers through use of supervisor and replacement employees.

It is a matter of common practice in the railroad industry for carriers faced with strikes to attempt to provide such service as they can through use of supervisory personnel, and, if the strike continues long enough and the prospects of settlement are dim enough, they will seek to hire replacement employees. This practice was developed in the record of the 1961 hearings before the Presidential Railroad Commission established to investigate the fireman, crew consist and work rules disputes between most of the nation's rail carriers and the unions representing operating employees. Exec. Order No. 10891, 3 C.F.R. 418 (1959-1963 Comp.). The uncontradicted testimony relating the practice appears at pages 14666-14822 of the Transcript of Proceedings of the Presidential Railroad Commission on file with the National Mediation Board. Its purpose was to establish that fireman and crew consist rules then prevailing required more employees than necessary for safe and efficient railroad operations by showing that during strikes carriers had been able to operate safely and efficiently by using supervisors not working under collective agreement conditions. To this end, the witness prefaced his testimony with this statement:

> "It has become almost invariable in this industry that where one craft of railroad employees is engaged in a work stoppage, other organized employees including the operating crafts, refuse to cross the picket lines. It is also commonplace for the operating employees to refuse to provide service to a customer whose employees are on strike. In such instances as these the railroads have, where possible, undertaken to serve the needs of their patrons by operating with

crews of supervisory personnel. These situations are so numerous that I will report to the Commission only on a few which are representative . . ." Transcript, *supra,* at 14673.

Railroad efforts to operate under strike conditions are but part of a practice accepted by and expected of employers generally. This Court has explicitly acknowledged and approved it. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333, 345-346 (1938); *National Labor Relations Board* v. *Columbian Co.,* 306 U.S. 292, 295 (1939). It has likewise been recognized and sanctioned by the Courts of Appeals. *Textile Workers* v. *Arista Mills Co.,* 193 F.2d 529, 534 (4th Cir., 1951); *National Labor Relations Board* v. *Bradley Washfountain Co.,* 192 F.2d 144, 153 (7th Cir., 1951); *National Labor Relations Board* v. *Jackson Press, Inc.,* 201 F.2d 541, 546 (7th Cir., 1953).

Both the government and the unions call attention to the fact that in the entire history of the Railway Labor Act no court has ever ruled that a railroad could, in the face of a strike, attempt to provide some transportation service to shippers and passengers through use of supervisory personnel and replacement employees working under other than pre-strike agreement conditions. (Petition for Certiorari, No. 750, 10; Petition for Certiorari, No. 782, 15-16).

The answer to this is easy. It turns on the accepted practice of the industry. The reason why no court has ever ruled on the question raised here is that no one ever thought to raise it before. In other words, since enactment of the Railway Labor Act the American railroads have been operating or attempting to operate during work stoppages with employees governed by other than pre-strike working conditions, yet, to our knowledge, neither

the unions nor the government have ever undertaken to attack in court the lawfulness of such action. Until now it surprised no one.

If, as it now alleges, the changes unilaterally instituted by Florida East Coast on February 3, 1963, violated the "unambiguous and unqualified language of the Railway Labor Act" (Petition for Certiorari, No. 782, 9), why did the government wait until April 30, 1964, to try to do something about it? Likewise, if as the unions now say, the carrier violated the "clear, plain, mandatory provisions of the Railway Labor Act" (Petition for Certiorari, No. 750, 10), why did they wait for 15 months to move in and attempt to protect the interests of their constituents?

D. The Court of Appeals Has Construed the Railway Labor Act as Prescribing a Rule Contrary to Settled Common-Law Rules of Contracts

While collective bargaining agreements have been characterized in various ways, they nonetheless are contracts. *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 334-336 (1944). As contracts in the field of labor relations covered by an Act of Congress, they are governed by federal rather than state law. So this Court has expressly ruled on numerous occasions. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 457 (1957); *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 506-507 (1962); *Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95, 102-104 (1962); *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 246 (1962). While these cases arose under Section 301 of the National Labor Relations Act, 29 U.S.C. § 185, which is not directly applicable here where the parties are governed by the Railway Labor Act, the same concept of federal law as the law to be applied obtains. *Larsen* v. *American Airlines, Inc.*, 313 F.2d 599, 602-603 (2d Cir., 1963). In *Lincoln Mills*,

supra, at 456-457, this Court said that the federal law of labor contracts is one "which the courts must fashion from the policy of our national labor laws," and undertook to outline the sources of that law. The Court summarized: "The range of judicial inventiveness will be determined by the nature of the problem."

It is necessary, therefore, that the Railway Labor Act be considered in light of the fact that it sanctions and is built around the collective agreement—a contract—as the focal point of the carrier-union relationship. The Court of Appeals has ruled—and the government and the unions here contend—that the Act requires a carrier to continue to perform its obligations under collective agreements notwithstanding the fact that the unions, by striking, have rejected those agreements at least for the duration of the strike.

This attributes to Congress an intention to embody in the Railway Labor Act a rule of contracts diametrically opposed to one of the most basic concepts of common law. This was stated in 5 WILLISTON, CONTRACTS § 1301 (Williston and Thompson rev. ed. 1937) as follows:

> "A promisor can no more be expected to perform his promise when it is clear that he is not going to receive counter-performance than when he actually has not received it. Baron Parke—a judge not likely to stretch too far the rules of the common law—so held in Ripley v. M'Clure [4 Ex. 345], and the law is clearly to that effect."

There can be no doubt that these common-law principles are applicable to labor agreements as a part of our federal common law of labor contracts. The Court of Appeals for the District of Columbia said so in *United Electrical Workers* v. *National Labor Relations Board,* 223 F.2d 338, 341 (D.C. Cir., 1955), cert. denied 350 U.S. 918 (1956), rehearing denied 351 U.S. 918 (1956):

> "It is general law that one party to a contract need not perform if the other party refuses in a material respect to do so. [Citing Williston.] And *that rule applies to labor contracts.*" (Emphasis supplied.)

This Court itself has applied common-law rules of contracts in federal labor cases. For example: *National Labor Relations Board* v. *Brown,* 380 U.S. 278, 287 (1965); *National Labor Relations Board* v. *Rockaway News Co.,* 345 U.S. 71, 79 (1953). They are regularly applied in the lower federal courts. *Boeing Airplane Co.* v. *Aeronautical Industrial District Lodge No. 751,* 188 F.2d 356 (9th Cir., 1951), cert. denied 342 U.S. 821 (1951); *United Biscuit Co.* v. *National Labor Relations Board,* 128 F.2d 771, 775 (7th Cir., 1942); *Boeing Airplane Co.* v. *National Labor Relations Board,* 174 F.2d 988 (D.C. Cir., 1949). They should be applied by this Court in the case at bar.

We do not question but that Congress can, subject to constitutional restrictions, prescribe any rule of railroad labor contract law it wants. But if and when it proposes to have applied rules radically different from those accepted at common law it should say so plainly. In the absence of such statement, the courts can only assume that it intended to have familiar rules of contract law applied.

Nothing in the Railway Labor Act expresses directly or indirectly an intent by Congress to adopt the unprecedented rule of contracts applied by the Court of Appeals and urged upon this Court by the government and the unions. That being the case, the rule which it must be assumed Congress approved, is that when unions strike a railroad any collective agreement theretofore in effect is either terminated altogether or suspended for the duration of the strike.

As a practical matter, it would make little or no difference whether the collective agreement were treated as terminated completely or as suspended for the duration of the strike. But, as Williston says, "... [W]ords have their importance. If wrongly used, wrong ideas are sure to follow, and wrong decisions follow wrong ideas." 5 WILLISTON, CONTRACTS § 1302 (Williston and Thompson rev. ed. 1937). We turn to Williston for the answer:

> "Neither where the plaintiff's excuse for his own nonperformance is the defendant's actual breach of the contract nor where that excuse is a prospective breach because of repudiation does the plaintiff terminate the contract merely by availing himself of his excuse. *The contract still exists, but one party to it has a defense and an excuse for non-performance.*" *Ibid.* (Emphasis supplied.)

Accordingly, the rule which this Court should read into the Railway Labor Act is that when a railroad union calls a strike the collective agreement between it and the carrier is suspended and the carrier is excused as a matter of law from complying with that agreement for the duration of the strike.

E. The Court of Appeals has Construed the Railway Labor Act to Express a Federal Labor Policy Contrary to the Policy Found by this Court and Courts of Appeals in Cases Arising Under the National Labor Relations Act

The Court of Appeals for the Fifth Circuit has, in its answer to the question here considered, construed the Railway Labor Act as evincing a policy of Congress contrary to the general policy of labor law found by this Court and by Courts of Appeals to have been expressed in the National Labor Relations Act.

The government has previously sought to distinguish cases arising under the National Labor Relations Act on two grounds—that the Act contains no *status quo* provisions comparable to those of the Railway Labor Act, and that collective agreements in the railroad industry are commonly of a continuing nature, remaining in effect until changed, unlike the usual agreements under the National Labor Relations Act which are effective for stated periods of time.

Neither of the bases relied on by the government to avoid the impact of National Labor Relations Act decisions is valid. First, no *status quo* provisions of the Railway Labor Act were in force when Florida East Coast undertook to resume operations on February 3, 1963, under temporary working conditions different from those effective prior to the strike. The dispute which resulted in the strike by the unions was a major one and the processes of the Railway Labor Act relating thereto had been exhausted. Second, the custom of having continuing collective agreements in the railroad industry compared with the practice of limited term agreements in industries covered by the National Labor Relations Act is a point of technical difference with no substantial legal distinction. As we have already pointed out, an otherwise continuing collective agreement under the Railway Labor Act becomes unenforceable when repudiated by a union strike—it is suspended for the duration of the work stoppage. Being suspended, it is of no more use to the union and its members than if it had expired by its own terms. It continues as the basis upon which a new collective agreement would be constructed but so does the agreement under the National Labor Relations Act which has expired.

Otherwise applicable decisions arising under the National Labor Relations Act cannot thus be wished away because they did not arise under the Railway Labor Act. Although

in these cases this Court and other courts considered specific provisions of the National Labor Relations Act, the decisions announced certain facets of our federal labor policy common to that Act and the Railway Labor Act as well. In *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 346 (1944), a case arising under the Railway Labor Act, this Court said:

> "Collective bargaining was not defined by the statute which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States."

Through footnote reference, the Court cited *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U.S. 514, 524-525 (1941), where it had called attention to the fact that the House Committee had recommended enactment of the National Labor Relations Act as "an amplification and clarification of the principles enacted into law *by the Railway Labor Act* and by § 7(a) of the National Industrial Recovery Act." H.R. Rep. No. 1147, 74th Cong., 1st Sess. 5 (1935). (Emphasis supplied.)

The very language quoted above from the *Telegraphers* case was subsequently quoted by this Court in *National Labor Relations Board* v. *American Insurance Co.*, 343 U.S. 395, 408 (1952), to expand on the meaning of "bargain collectively" as used in the National Labor Relations Act.

That the National Labor Relations and Railway Labor Acts are generally to be construed as being different forms of expression of essentially the same policy is attested by numerous opinions of this Court citing decisions under one or the other Act interchangeably and without reference to the particular Act which gave rise to the question being considered. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33, 45-48 (1937); *Termi-*

nal Railroad Assn. v. *Brotherhood of Railroad Trainmen,* 318 U.S. 1, 6, (1943); *National Labor Relations Board* v. *American Insurance Co.,* 343 U.S. 395, 402, 408 (1952); *Leedom* v. *Kyne,* 358 U.S. 184, 189-191 (1958); *National Labor Relations Board* v. *Insurance Agents Union,* 361 U.S. 477, 486 (1960); *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co.,* 372 U.S. 284, 290 (1963).

With this background, we turn to a series of cases decided by this Court and Courts of Appeals other than the Fifth Circuit demonstrating the inconsistency between the opinion of the latter in this case and the prevailing national labor policy.

In two recent cases, the National Labor Relations Board has tried unsuccessfully to have the courts impose on industry generally a rule similar to that which the Court of Appeals has here pronounced for the railroads at the urging of the government and the unions.

Hawaii Meat Co. v. *National Labor Relations Board,* 321 F.2d 397 (9th Cir., 1963), involved an economic strike against a wholesale meat processor. As part of its effort to keep its business going during the strike, the company subcontracted its delivery work. The National Labor Relations Board found the company guilty of a refusal to bargain in violation of Section 8 (a) (5) of the National Labor Relations Act. As later quoted by the Ninth Circuit, the Board ruled, in pertinent part:

> " . . . [A]n employer fails to bargain and violates section 8 (a) (5) if, after a strike begins, he does not give the union an opportunity to bargain about this proposal to change the existing terms and conditions of employment among which, and not the least important, is the permanency of the job classifications which were held by employees when the strike began." 321 F.2d at 398.

With an eye on the *Fibreboard* case which was then on its way to and later decided by this Court, *Fibreboard Corp.* v. *National Labor Relations Board,* 379 U.S. 203 (1964), the court in *Hawaii Meat* said that for the purpose of its decision it would assume that, absent the strike, the employer would have been required to bargain regarding its decision to subcontract delivery work. 321 F.2d at 399. The court also said that it assumed that if the union so requested during the strike the employer would be obligated to bargain on the question whether the subcontracting arrangement would be continued after the strike had ended. *Ibid.*

Because it bears so directly on the instant case, we quote the four governing paragraphs of the Ninth Circuit's decision in *Hawaii Meat:*

> "Our answer is 'no' to the narrow question which is presented to us, namely, whether a decision to subcontract, taken at the time an economic strike occurs, and made for the purpose of keeping the plant operating, constitutes a failure to bargain as required by the Act, when, after the strike begins, the employer does not, on its own motion, offer the union an opportunity to bargain about the decision to subcontract. It is the decision to subcontract, not the matter of what is to be done with or for the employees who are displaced by subcontracting, that is here involved. As to the latter there is authority that it is a mandatory subject of bargaining; we express no opinion upon the question.
>
> "We think that when an employer is confronted with a strike, his legal position is, in some respects, different from that which exists when no strike is expected or occurs. No case holds that a struck employer may not try to keep his business operating; on the contrary, it is quite clear that he has the right to do so. He may not use the strike as an excuse for

committing unfair labor practices. (See, e.g., *NLRB* v. *United States Cold Storage Corp.*, 5 Cir., 1953, 203 F.2d 924) But it does not follow that what this employer did to meet the strike was an unfair labor practice, even though it might have been one in the absence of a strike.

"We think that a requirement that, upon the occurrence of a strike, and before putting into effect a subcontracting arrangement designed to keep the struck business operating, the employer must offer to bargain about the decision to subcontract, would effectively deprive the employer of this method of meeting the strike. A mere naked offer to bargain would not end the matter. The union could, by accepting the offer, deprive the employer of an effective means of meeting the strike for a period of time that might render it valueless to the struck employer. An employer is under no duty to offer to bargain, after a strike starts, about a decision to hire replacements for strikers, even on a permanent basis. (See *NLRB* v. *Mackay Radio & Tel. Co.*, 1938, 304 U.S. 333 . . .). . . ."

"We think it no more proper for the Board to intrude upon the decision of the employer, in a strike situation, to keep going by subcontracting, than to intrude upon a decision to replace, permanently, individual strikers. This, we think, is consistent with the philosophy expressed by the Supreme Court in *NLRB* v. *Insurance Agents' Union*, 1960, 361 U.S. 477, 488-498. . . . " 321 F.2d at 399-400.

On this basis, the Board's order was set aside and its petition to enforce denied. *Id.*, at 401.

The Board fared no better less than a year later when it took another of its orders, which had been based on its own holding in *Hawaii Meat*, to the Seventh Circuit. *National Labor Relations Board* v. *Abbott Publishing Co.*, 331 F.2d 209 (7th Cir., 1964), involved the labor troubles of a newspaper publisher and printer. Its organized employees

were divided into two groups, one in the "nonmechanical unit" and the other in the "mechanical unit." When both units went out on strike, the publisher subcontracted the work of the mechanical unit and managed to keep its plant in operation. The Board found the company guilty of a refusal to bargain and petitioned for enforcement of its order.

The Seventh Circuit declined enforcement and set the order aside. Citing the Ninth Circuit in *Hawaii Meat*, it said:

> "When the strike occurred on April 16, 1961, respondent met its obligation to its newspaper readers and advertisers and kept its plant in operation. Deadlines were met and editions were issued. Respondent refused to permit the strike to paralyze its operation. To meet the emergency thrust upon it by the union, the employer acted by contracting out its composing work. It was a result which was forced upon it by the union and we agree with the Trial Examiner that this action, without notifying or consulting with the union, was not a violation of § 8 (a) (5) of the Act. We are not convinced by the Board's order or its reasons to the contrary. Moreover, as a result of its experience in contracting out this work, respondent learned that it had found a cheaper way of handling this part of its business, as detailed by the Trial Examiner. Thus respondent continued its changed method of operation, by eliminating the use of certain of its machines.
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> * * * * *
>
> "We are not called upon in this case to decide whether, in a situation where no strike has been called and the bargaining table remains accessible to both parties the question of contracting out work by an employer is a subject of collective bargaining. Instead, we have a case where the union has turned its back on collective bargaining and has, by calling a strike, placed

> the employer suddenly in a position made precarious by the inexorable demands of newspaper publication. If publication may be interrupted while bargaining drags on over matters which have to do with what means the publisher may use in getting his paper on the streets and in the mail, the paper may cease to exist. It would be a startling doctrine indeed if this court were to tell companies and employers faced with extinction because of a strike, that before they can make economic business decisions to contract out work in order to continue operations, they must first consult the union that caused the threat of extinction." 331 F.2d at 213.

Another earlier case squarely in point and contrary to the Fifth Circuit decision here being considered is *Pacific Gamble Robinson Co.* v. *National Labor Relations Board,* 186 F.2d 106 (6th Cir., 1950). The employer involved was a wholesale distributor of fruit, vegetables, groceries, and other produce. It undertook to continue operation of its business notwithstanding an economic strike by its employees. To this end, it sought and succeeded in hiring replacement employees. It paid replacements more than had been paid to employees who had occupied the same jobs before the strike.

On these facts, the Board found the employer guilty of a refusal to bargain in violations of Sections 8 (a) (1) and 8 (a) (5) of the National Labor Relations Act.

The Sixth Circuit denied enforcement and set the Board's decision and order aside. It relied on this Court's opinion in *National Labor Relations Board* v. *Mackay Radio & Tel. Co.,* 304 U.S. 333 (1938), saying:

> "There is no requirement of law that the employer who rightfully hires replacements to continue his business after a strike should offer the replacements the same rate which has been offered the union." 186 F.2d at 109.

These cases stem not only from this Court's decision in *Mackay Radio, supra,* but more directly from *National Labor Relations Board* v. *Insurance Agents Union,* 361 U.S. 477 (1960).

The holding in *Mackay Radio* can be briefly summarized —an employer subject to the National Labor Relations Act does not violate the statutory duty to bargain while an economic strike is in progress by hiring replacement workers, even if they are hired on a permanent basis. Carried to the context of this case, *Mackay Radio* means that under the policy embodied in the National Labor Relations Act Florida East Coast quite properly undertook to use supervisors and replacements in its effort to operate its railroad notwithstanding the strike confronting it. That the doctrine of *Mackay Radio* is applicable to cases arising under the Railway Labor Act is attested by *Flight Engineers International Assn.* v. *Eastern Air Lines,* 243 F.Supp. 701, 707 (S.D. N.Y., 1965), pending on appeal to the Second Circuit.

The *Insurance Agents* case is even more important because its *rationale* is directed so closely to the problem of this case. There the employees undertook while negotiations for a new collective contract were in progress a program of harassing tactics. They did not actually go out on strike but refused to perform their day-to-day duties in the regular way. On complaint of the company, the National Labor Relations Board found the unions had failed to bargain in good faith.

This Court, ruling that the Board had erred in its construction of the National Labor Relations Act, relied heavily on the settled principle of "our labor policy" that Congress is not concerned with the substance of labor agreements apart from certain elementary proscriptions. 361 U.S. at 484, 485-486, 488, 490. In this connection, indicating the close policy ties between the National Labor Relations and Railway Labor Acts, the Court cited in its

support *Terminal Railroad Assn.* v. *Brotherhood of Railroad Trainmen,* 318 U.S. 1 (1943).

From this point, the Court proceeded in the *Insurance Agents* case to emphasize the mutual duty of bargaining in good faith imposed on the parties by the Act, observing that apart from that duty, ". . . Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *Id.,* at 488. Then it said:

> ". . . [T]he truth of the matter is that at the present stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between the parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side." 361 U.S. at 489.

In effect, the Court ruled that the order of the Board violated the principle that the federal government is not concerned with the substance of collective agreements. By limiting its choice of economic weapons, the Court said that the Board affected the union's economic strength and thereby the process of bargaining itself:

> "Thus the Board in the guise of determining good or bad faith in negotiations could regulate what economic weapons a party might summon to its aid. And if the Board could regulate the choice of economic weapons that may be used as a part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract." *Id.* at 490.

This, the Court said, was contrary to "our labor policy" which does not contemplate "government control of the results of negotiations." *Ibid.*

Subsequently in its opinion in *Insurance Agents* the Court again referred to the use of economic pressures as

"part and parcel of the process of collective bargaining." 361 U.S. at 495. Finally, it specified the reason why the National Labor Relations Act could not be construed to prohibit the particular form of economic pressure utilized by the Insurance Agents Union:

> Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions.... But the activities here involved have never been specifically outlawed by Congress." *Id.* at 498.

In the case at bar, the Court of Appeals has assumed a power under the Railway Labor Act which the Court in *Insurance Agents* ruled was not vested in the National Labor Relations Board by the National Labor Relations Act. Just as no specific proscription of the action of the union in *Insurance Agents* could be found, so no limitation on the right of carriers to adopt temporary changes in working conditions during a strike can be found in the Railway Labor Act.

National Labor Relations Board v. *Brown*, 380 U.S. 278 (1965), involved a lockout by members of an employer association of retail food stores when one of their number was struck by a union seeking to pursue the whipsaw tactic. While their employees were locked out, all members of the association continued to operate with temporary replacements. The employers further refused to use any regular employees who were willing to work rather than temporary replacements.

There was no doubt about the employers' right to use temporary replacements in view of *Mackay*, but the Board held that by locking out their employees and using temporary replacements the employers had violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. The Court of Appeals refused to enforce the Board's order.

This Court affirmed; citing the *Insurance Agents* case, it said: "We begin with the proposition that the Act does not constitute the Board as an 'arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.' " 380 U.S. at 283. To this it added:

> "In the absence of proof of unlawful motivations, there are many economic weapons which an employer may use that either interfere in some measure with concerted employee activities, or which are in some degree discriminatory and discourage union membership, and yet the use of such economic weapons does not constitute conduct that is within the prohibitions of either § 8 (a)(1) or § 8 (a)(3)." *Ibid.*

In conclusion, the Court said that section 8(a)(1) requires evidence of unlawful motivation and Section 8(a)(3) requires evidence of unlawful intent, neither of which could be found with little more than evidence of resort to a lookout and use of temporary employees.

We read the case as reinforcing our contention that the broad scope of the self-help of employers under strike conditions is not to be limited by the government in the absence of express or plainly implied statutory restrictions.

Next is *American Ship Building Co.* v. *National Labor Relations Board,* 380 U.S. 300 (1965). The employer and the union had engaged in bargaining over the terms of a new collective agreement. The old agreement expired but there was no strike and operations and negotiations continued. Eleven days after the old agreement had expired the union had not struck, but the parties had reached an impasse. The employer seized the initiative and locked its employees out. In its notices to employees, the employer stated that its action was taken because of the unresolved labor dispute and that each employee was "laid off until further notice." 380 U.S. at 304.

The National Labor Relations Board found that the sole purpose of the employer's lockout was to exert economic pressure to secure prompt settlement of the dispute on favorable terms. 380 U.S. at 305. On this basis, it ruled that the employer had violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. The Court of Appeals for the District of Columbia granted the Board's petition for enforcement.

This Court reversed. The issue before it was carefully narrowed:

> "What we are here concerned with is the use of a temporary layoff of employees solely as a means to bring economic pressure to bear in support of the employer's bargaining position, after an impasse has been reached." 380 U.S. at 308.

The Court made it clear that the use by an employer of a lockout is not to be condemned under the Act as *per se* unlawful in spite of the economic disadvantage it might cause employees:

> "The lockout may well dissuade employees from adhering to the position which they initially adopted in the bargaining, but the right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage. Proper analysis of the problem demands that the simple intention to support the employer's bargaining position as to compensation and the like be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful." *Id.* at 309.

In connection with its ruling that the employer's lockout standing alone did not constitute discrimination to

discourage union membership in violation of Section 8(a)(3), the Court said:

> ". . . [W]e have consistently construed the section to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership . . . . Such a construction of § 8(a)(3) is essential if due protection is to be accorded the employer's right to manage his enterprise. . . ." *Id.* at 311.

The Court rejected the Board's contention that in its order it had exercised its special competence in labor matters to strike a balance between the bargaining strength of unions and employers. The board had listed the "other weapons" given the employer to "counterbalance the employees' power of strike." *Id.* at 316. Included was the right of the employer—of singular significance to the case at bar—to "institute unilaterally the working conditions which he desires once his contract with the union has expired." *Ibid.* The Board took the position that these "weapons" resulted in the employer being "adequately equipped with tools of economic self-help." *Ibid.*

Describing the action of the Board, the Court said,

> "In this case the Board has, in essence, denied the use of the bargaining lockout to the employer because of its conviction that use of this device would give the employer 'too much power.' In so doing the Board has stretched §§ 8 (a)(1) and (3) far beyond their functions of protecting the rights of employee organization and collective bargaining." *Id.* at 317.

Concluding, the Court ruled:

> "We are unable to find that any fair construction of the provisions relied on by the Board in this case can support its finding of an unfair labor practice. Indeed, the role assumed by the Board in this area is funda-

> mentally inconsistent with the structure of the Act and the function of the sections relied upon. The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress. Accordingly, we hold that an employer violates neither § 8(a)(1) nor § 8(a)(3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position." *Id.* at 318.

There can be no more drastic unilateral change in conditions on the part of an employer than a lockout like that involved in the *American Ship Building* case. The National Labor Relations Board tried to outlaw the lockout by an employer where its sole purpose was to bring economic pressure to bear on a union after an impasse had been reached in collective bargaining. This Court rejected that effort because Congress did not intend to empower the Board to limit employers in their choice of economic weapons.

Here the Court of Appeals has done what this Court ruled the National Labor Relations Board could not do in *American Ship Building*. This attempt by the court below should be rejected here as that of the Board was rejected there.

F. The Court of Appeals Has Construed the Railway Labor Act Contrary to the Intent of Congress Therein to Avoid Interruptions to Commerce and the Operations of Carriers, and to Make Carriers and Unions as Equal as Possible in the Processes of Bargaining

The purpose of our scheme of regulations of labor relations is to preserve industrial peace and avoid interruptions to commerce by equalizing insofar as possible the rela-

tive positions of the parties to labor disputes. *Brotherhood of Railway Clerks* v. *Assn. for the Benefit of Non-Contract Employees,* 380 U.S. 650, 658 (1965); *Virginian Railway* v. *System Federation No. 40,* 300 U.S. 515, 547 (1937); *American Ship Building Co.* v. *National Labor Relations Board,* 380 U.S. 300, 315-317 (1965). Thus, Section 2(1) of the Railway Labor Act, 45 U.S.C. § 152 (1), states as the first of the five "General Purposes" to be served by the Act:

> "To avoid any interruption to commerce or to the operation of any carrier engaged therein. . . ."

The construction given the Act by the Court of Appeals in this case and urged by the government and the unions flies in the teeth of the congressional purpose of seeking to avoid interruptions to commerce or the operations of carriers and is inconsistent with the intent that carriers and employees should be treated as equals in the handling of disputes covered by the Act.

Any plan to compel a carrier to cease operating completely or nearly so when its employees choose to strike would be a curious way of discouraging interruptions to commerce or to carrier operations. This is particularly clear when there is available an alternative permitting carriers to operate as best they can for the duration of a strike under working conditions temporarily different from those specified in collective agreements applied before the strike.

Given these choices, which did Congress intend to adopt in the Railway Labor Act? If it meant what it said about seeking to avoid interruptions to commerce or carrier operations, the only answer is the outlined alternative. Carriers faced with strikes must be free to operate to the extent they can with supervisory and replacement employees working for the duration of the strike under temporary conditions different from those provided

in collective agreements applicable before the strike. This plan best serves the purpose of avoiding strike interruptions of commerce and carrier operations while at the same time leaving unions and those they represent free to exercise their right to self-help in the form of a strike.

Likewise, the construction of the Act followed by the Court of Appeals and urged by the government and the unions is inconsistent with the intent of Congress that carriers and unions representing their employees should be on as equal footings as possible in their handling of major disputes. They would have this Court rule that striking unions are entitled to reject in their entirety for the duration of the strike the provisions of collective agreements previously applicable. At the same time, they contend that carriers faced with work stoppages continue to be bound by all of the provisions of pre-strike collective agreements. All would agree that a carrier can make such changes as the unions agreed to or which were carried through the entire gamut of the Act's major dispute procedures. The Court of Appeals alone would permit carriers to make such changes as a court of competent jurisdiction determined were "reasonably necessary" to make a "meaningful reality" of their right to operate or try to operate under strike conditions.

There is no need to elaborate on the obvious discrimination this view of the law would work against carriers and in favor of unions in the handling of major disputes. Surely, Congress cannot be taken as having intended such discrimination in the absence of a clear statement directly or by unavoidable implication so indicating, particularly when such intention is contrary to the necessarily implied intention already recognized by this Court of treating carriers and unions alike insofar as possible.

G. The Railway Labor Act, Strictly Construed as a Criminal Statute, Does Not Support the Interpretation of the Court of Appeals

While we believe that the ordinary rules of construction of Acts of Congress lead inevitably to the construction of the Railway Labor Act we herein propose, it should be pointed out, as the unions state at page 12 of their Petition for Writ of Certiorari in No. 750, that: "Unlike the National Labor Relations Act. . ., the Railway Labor Act provides sharp 'teeth' for violations of its prohibitions." They then quote Section 2, Tenth, of the Act, 45 U.S.C. § 152, Tenth, which makes violations of certain paragraphs or sub-sections of Section 2 misdemeanors on the part of the offending company, its officers or agents, and provides for fines of not less than $1,000 nor more than $20,000 for each offense, with each day of violation constituting a separate offense.

Florida East Coast operated or tried to operate under working conditions different from those provided in collective agreements in effect prior to the strike from February 3, 1963 through October 30, 1964—a total of 637 days. The courts below have held that it violated the Railway Labor Act in doing so. Under Section 2, Tenth, of the Act, there were, therefore, 637 separate offenses chargeable against the carrier and its responsible officers and agents.

We take it that these would constitute 637 separate offenses per collective agreement unilaterally but temporarily changed. There were at least 15 separate collective agreements involved (11 with non-operating and 4 with operating unions), so there would have been 9,555 separate violations. This means—if the courts below were right—that Florida East Coast and its responsible officers and agents were and perhaps are subject to fines of not less

than $9,555,000 nor more than $191,100,000, with the officers and agents further subject to imprisonment for terms not to exceed 4,777 years and 6 months.*

Criminal statutes are, as this Court has repeatedly observed, to be strictly construed. In *United States* v. *Resnick,* 299 U.S. 207, 209-210 (1936), not only was this general rule restated, but the Court went further to state that the failure of Congress expressly to permit certain activity in a relevant criminal statute is not to be taken as prohibiting it. This rule of construction is a product of the basic principle that: "... [T]here are no common-law offenses against the United States, ... before a man can be punished as a criminal under the federal law his case must be 'plainly and unmistakably' within the provisions of some statute ...." *United States* v. *Gradwell,* 243 U.S. 476, 485 (1917). The test to be applied in the instant case is that applied in *United States* v. *Universal C. I. T. Credit Corp.,* 344 U.S. 218, 221-222 (1952), involving criminal charges of violations of the Fair Labor Standards Act:

> "... [W]hen choice has to be made between two readings of what conduct Congress had made a crime, it is appropriate before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication."

The case at bar is, to be sure, a civil suit for equitable relief. The applicable statute nonetheless remains a

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* It may be that no violations could be found while the actions of Florida East Coast were, in effect, sanctioned by the stay issued March 17, 1964, by the Court of Appeals against the preliminary injunction issued by the District Court in the *Trainmen's* case. In that event the minimum fine would be only $6,630,000, and the maximum $132,600,000, with the maximum jail term 3,315 years.

criminal one and must be strictly construed. While the burden of proof in a civil suit like this is different from that which would be required in a criminal case, the statute must be given the same meaning whether the particular form of action is criminal or civil. See *United States* v. *Universal C.I.T. Credit Corp., supra,* at 222. Burden of proof relates only to the problem of establishing the facts. Here, as in other cases which might follow later, there is and would be little or no question about the facts. The central issue would remain one of law. Accordingly, the manner in which this Court construes the Railway Labor Act here will control any later efforts to enforce the provisions of the Act involved through application of criminal sanctions.

The District Judge, in his Conclusion of Law No. 7, found that Florida East Coast, in deviating from the working conditions specified in collective agreements in force prior to the strike, violated Sections 2, First, Second, and Seventh; Section 5, First; and Section 6 of the Railway Labor Act, 45 U.S.C. §§152, First, Second, Seventh; 155, First; 156. (R. 188.) This Finding was affirmed by the Court of Appeals.

We submit that unless this Court would affirm criminal convictions of Florida East Coast and its responsible officers and agents on the basis of the same reasoning adopted by the courts below, the decision of the Court of Appeals must be reversed. Since the Railway Labor Act manifestly does not "plainly and unmistakably" proscribe the actions of Florida East Coast, criminal convictions for violations of the Act would be out of the question. We perceive, therefore, no alternative to reversal of the Court of Appeals.

H. The Court of Appeals Erred in Basing Its Decision on One Phrase of One Section of the Railway Labor Act; Read as a Whole, the Act Contradicts the Conclusion of the Court of Appeals

The decision of the Court of Appeals and the contentions of the government and the unions that a struck carrier violates the Railway Labor Act when it unilaterally institutes temporary changes in working conditions as applied under collective agreements prior to the work stoppage rests primarily on a narrow construction of one part of Section 6 of the Act. This construction is at one and the same time too literal and yet not literal enough.

It is too literal in that it does not adequately take into account, among other things, the purposes or policy of the Act and other related legislation, the evident intent of other sections of the Act, the legislative history of the Act read in the light of accepted practices, or settled concepts of contract law. It is not literal enough because it emphasizes out of all proportion only one part of Section 6 at the expense of other parts which when read strictly would not proscribe the action of Florida East Coast found unlawful by the Court of Appeals.

Section 2, Seventh, of the Railway Labor Act, 45 U.S.C. § 2, Seventh, reads as follows:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class *as embodied in agreements* except in the manner prescribed in such agreements or in section 6 of this Act." (Emphasis supplied.)

While the Court of Appeals, the government and the unions all emphasize the first part of this section that no "change" shall be made in "rates of pay, rules, or working conditions" except in the manner provided by Section 6, we would like to emphasize that what is forbidden are changes

of rates of pay, rules, or working conditions "as embodied in agreements."

Here, as we have so repeatedly stated, the changes which we assert a carrier faced with a strike, including Florida East Coast, is free to make under the law are temporary changes as defensive measures of self-help to be effective only for the duration of the strike. Changes of this character are not changes in "rates of pay, rules, or working conditions of . . . employees, *as a class as embodied in agreements . . . .*" *St. Louis, San Francisco and Texas Ry. Co.* v. *Railroad Yardmasters,* 328 F.2d 749, 752 (5th Cir., 1964); cert. denied 377 U.S. 980 (1964); *Switchmen's Union* v. *Central of Georgia Ry. Co.*, 341 F.2d 213 (5th Cir., 1965). The statute is directed against attempted unilateral permanent changes in collective agreements. It does not purport to cover or limit a carrier's right to resort to self-help, to make such temporary changes as it deems necessary for it to operate as best it can during the strike.

Section 2, Seventh, incorporates by reference and directs attention to Section 6 of the Act, 45 U.S.C. § 156. The latter requires carriers and unions to give each other 30 days' written notice of proposed changes in rates of pay, rules, or working conditions. Conferences between the parties are called for, to be followed possibly by mediation under the auspices of the National Mediation Board. Then it reads:

> ". . . rates of pay, rules, or working conditions shall not be altered by the carrier *until* the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board." (Emphasis supplied.)

The Court of Appeals, the government and the unions emphasize the first part of Section 6 requiring written

notice of intended changes. We rely on the part quoted which expressly authorizes a carrier to change "rates of pay, rules, or working conditions" after "the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

This authority to make changes in collective agreement provisions specifically extended to carriers does not purport to—and cannot be—limited to controversies in which the carriers are moving parties seeking through service of written notice to make changes. It would apply whether changes were proposed by carriers or by unions.

It is clear that Section 6 of the Act contemplates changes in conditions by carriers and nothing purports to limit that right to changes originally proposed by them. If Congress had intended such limitation, it could very easily have said so. A fair reading of the words of this section indicates on the contrary an intention to authorize carriers to make defensive changes in working conditions as required to meet any offensive measures initiated by unions.

This construction is bolstered further by that portion of Section 5 of the Act referred to in the second sentence of Section 6. In Section 5, First, provision is made for proffers of arbitration by the Mediation Board. It states that if arbitration is refused by one or both parties the Board shall give notice to the parties that its efforts at mediation have failed. The section then continues:

> ". . . [F]or thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

By providing that during the 30-day period specified no changes shall be made in rates of pay, rules, or working conditions or established practices in effect prior to the dispute, Congress necessarily approved the institution of changes after expiration of the 30-day period. And again—as in Section 6—it did not undertake to limit the right to make changes to the moving party. The necessary implication is that Congress intended to treat the two parties to disputes covered by the section alike, neither to be preferred over the other. It meant to leave unions free to press their demands by resorting to strikes, with the carrier to be free to make such temporary defensive changes in conditions as it deemed necessary for it to exercise its right to self-help. At the same time, carriers were to be free after the 30-day cooling-off period without appointment of an emergency board to implement any changes they had formally proposed, with the unions allowed to strike in their exercise of their defensive right to resort to self-help.

The language of Section 10 of the Act, 45 U.S.C. § 160, referred to in Section 5, First, also supports this construction of the Act. After providing for appointment by the President of emergency boards to investigate and report on threatened railroad strikes which would "substantially . . . interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service," Section 10 states:

> "After the creation of such board, and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

Here too the sense of the language used envisions the parties to the dispute as equals. Rather than purporting to restrict one party or the other with respect to making changes in the "conditions out of which the dispute arose,"

Section 10 contemplates on its face that if the parties to a dispute are unable to resolve it within thirty days after an emergency board report both shall be free to make changes in the "conditions out of which the dispute arose."

The decision of the Court of Appeals and the contentions of the government and the unions would mean that after the expiration of the cooling-off period following an emergency board report, with no settlement agreement having been reached, the conditions out of which the controversy arose can be changed by the unions calling a strike without violating the Railway Labor Act. But, this view continues, carriers party to the dispute are required by the Act to carry on as before if they are going to make any attempt to operate as a part of the self-help which they are entitled to exercise.

This construction not only is not required by but is contrary to the wording and sense of Section 10.

We quote again this statement from the Court's opinion in *National Labor Relations Board* v. *Insurance Agents Union,* 361 U.S. 477, 498 (1960):

> "Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions. . . . But the [harassing] activities here involved have never been specifically outlawed by Congress."

Nothing in the Railway Labor Act specifically precludes carriers faced with strikes from making unilateral temporary changes in working conditions necessarily required to enable them to operate or attempt to operate pursuant to their common-law and statutory duty to provide transportation service to the public. Accordingly, the construction of the Act to the contrary by the Court of Appeals cannot stand. And, appraised as an Act carrying criminal sanctions which must be strictly construed, then *a fortiori* the interpretation of the Court of Appeals must be rejected.

I. Legislative History Tends to Confirm Rather than Contradict a Construction of the Railway Labor Act Releasing Carriers from the Obligations of Collective Agreements During Strikes

There is nothing in the legislative history of the Railway Labor Act affirmatively indicating an intention that carriers should be released from the obligations of collective agreements for the duration of strikes. This does not mean, however, that this history provides no guideposts or signals whatever regarding the intention of Congress.

First, the approach of the government and the unions to this history is wrong. Considering, as we have previously indicated, that the Act was superimposed on a system of bargaining under which there was no indication that carriers were to continue bound by collective agreements when their employees struck, the correct line of inquiry should be whether anything in the history of the Act manifested an intent to impose on carriers a restriction theretofore unknown. Pursuit of that inquiry discloses no evidence of such intent. This supports the conclusion that Congress did not mean in the Act to require carriers to apply prestrike collective agreements during work stoppages.

Secondly, the view of legislative history relied on by the government and the unions does not take into account the failure of Congress to take steps to curb the practice of carriers of instituting temporary working conditions during strikes. Indeed, the record is bare of any indications of complaint to Congress by the unions on this score. This too tends to confirm approval by Congress of the practice which the Court is asked to condemn.

In an unusual footnote appearing on pages 13-14 of its Petition for Writ of Certiorari in No. 782, the government undertakes to refer to legislative history. It cites

one part of the history of the Transportation Act of 1920 which act was later discarded because it was unsatisfactory in favor of the Railway Labor Act of 1926. *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U.S. 30, 40 (1957). Then it cites one page from the Congressional Record of 1926 to support its assertion that Congress "very likely . . . assumed" that railroad strikes would "cease," followed by an observation without support of any citation to the effect that Congress assumed as an alternative that "any strike would be accompanied by a total cessation of service."

Passing the patent *non-sequitur*, we can say that the Act on its face and as construed by the courts, together with its legislative history, dispels any notion that Congress "very likely . . . assumed" that its enactment would mean the end of railroad strikes. Undoubtedly, Congress hoped that the Act might be the means through which many or possibly even nearly all railroad strikes could be thereafter avoided, but it certainly knew better than to assume that all strikes would cease. For that very reason the possibilities of strikes were specifically contemplated by Sections 6; 5, First; and 10 of the Act—reviewed at length above. S. Rep. No. 606, 69th Cong., 1st Sess. 5 (1926); *Hearings before the Committee on Interstate and Foreign Commerce on H.R. 7180*, 69th Cong., 1st Sess. 94, 290-291 (1926); 67 Cong. Rec. 4524, 4587-4588, 4651, 4657, 8815, 8892 (1926).

As for the alleged assumption by Congress that any railroad strike "would be accompanied by a total cessation of service," we can only profess amazement that such a statement going to the heart of the central issue of the case could or would be advanced without a single supporting citation to the Act itself, to legislative history, to judicial decision, or to legal texts or articles. This apparent void

of authority eloquently confirms our view that the government's case (and the unions' as well) rests on a foundation of quicksand. How can it square this alleged assumption with Congress' express statement in Section 2 (1) of the Railway Labor Act, 45 U.S.C. § 152 (1), that one of its principal purposes was to avoid interruptions to commerce or the operations of carriers engaged therein?

In a similar vein, at pages 14-15 (and in note 9 on the latter page) of its Petition for Writ of Certiorari, the government says in effect that carriers should not attempt to operate in the face of a strike because other means of self-help are available. The only other means referred to, however, is "industry-wide strike insurance," which is said to be "of considerable potential effectiveness." To this we need only say that such insurance would be of small comfort to those dependent on a struck carrier for rail transportation service—those whose interests were of such concern to Congress in the Railway Labor Act.

What the government overlooks is that in a dispute such as that between Florida East Coast and the unions "More is involved than the settlement of a private controversy without appreciable consequences to the public." *Virginian Railway* v. *System Federation No. 40*, 300 U.S. 515, 552 (1937). The public is primarily concerned with maintenance of rail transportation service. It is apparent, therefore, that the construction of the Act advocated by the government and the unions, adopted (with an important exception) by the Court of Appeals, is contrary to the public interest. On the other hand, that urged by Florida East Coast and the railroad industry would serve the public interest to the maximum extent possible consistent with having railroad strikes at all—and unless and until Congress adopts a plan for governmental adjudication of ma-

jor as well as minor labor disputes in the railroad industry there are unfortunately going to be railroad strikes.

J. While the Unions Remain the Bargaining Agents for Crafts or Classes Represented Before the Strike, This Does Not Impair the Right of Carriers to Make Unilateral Temporary Changes in Conditions for the Duration of the Strike

The Court of Appeals ruled that the unions remain the bargaining agents for the crafts or classes of employment represented before the strike. 336 F.2d at 180.

Even so, however, and even if there were no limitations to this rule, it does not affect the right of carriers to make unilateral temporary changes in working conditions as defensive measures to counter union strikes. The unions may technically remain the bargaining agents for all in the crafts or classes represented before the strike—non-strikers as well as strikers—and they may continue as such agents until the strike is settled or they are replaced by other unions. But this does not affect the status of their pre-strike collective agreements with the carrier. By striking, the unions repudiate those agreements, refusing for the duration of the strike to carry out their obligations thereunder. The agreements are, therefore, suspended—unenforceable for the duration of the work stoppage. Accordingly, as long as the strike lasts the unions do not lose their status as statutory representatives empowered to negotiate new agreements, but in the interim they have no enforceable existing agreement. They are—as it were—unions without portfolio.

Under these circumstances, Florida East Coast was free—again for the duration of the strike—to supersede the col-

lective agreement by working conditions negotiated individually with employees who worked during the strike. *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342 (1944), relied on by the Court of Appeals, 336 F.2d at 180, is clearly inapplicable. It involved an effort by a carrier to change working conditions unilaterally notwithstanding a current and enforceable collective agreement.

K. Consideration of the Consequences of the Decision of the Court of Appeals Requires that Its Construction of the Railway Labor Act Be Rejected

The National Mediation Board, as required by Section 4, Second, of the Railway Labor Act, 45 U.S.C. § 4, Second, has reported annually to Congress since 1935 on the state of railroad labor relations. Even a hasty review of those reports indicates the unfortunate frequency of railroad strikes. While most are of short duration, there have been a number which continued for more or less extended periods. The mere fact that there are so many to which the law as announced by the courts below and as urged by the government and the unions would be applied dictates the necessity of a careful evaluation of the consequences of letting the decision of the court below stand or accepting the contentions of the government and the unions.

The courts below, the government, and the unions are all agreed that at least at the inception of a strike a carrier continues to be bound by all of the working conditions contained in collective bargaining agreements in effect prior to the strike. They do not come to a parting of the ways until later, when the courts say the carrier can be excused from certain provisions of the collective agreement on a showing of reasonable necessity, while the government and the unions contend that no departures from the

collective agreement—even temporary ones—can be permitted during the strike unless and until the carrier has exhausted the steps prescribed by the Railway Labor Act for the handling of major disputes.

The position of the government and the unions offers some interesting and not at all fanciful prospects.

At the moment of a strike, we may assume that almost all organized employees in the operating and non-operating crafts of the target carrier walk off their jobs when their tours of duty are finished, and those who are supposed to relieve them do not report for work. In short order the operations of the carrier grind to a halt. Supervisors are not to be permitted to operate any trains or perform any clerical functions because such would be contrary to the collective agreements on which the striking employees and their non-working sympathizers turned their backs.

So—trainloads of passengers would be left stranded to fend for themselves in cities, towns, and hamlets. These trains might well be carrying military personnel exclusively. U.S. Mail and express carried on regular passenger trains would fare no better than the passengers. Indeed, entire trains devoted to transportation of mail and express would be stopped. Carloads of perishables would be left standing where they were when the train crews reached the end of their particular runs. This might be somewhere on the main line or perhaps on a siding or in a yard. Carloads of materials essential to national defense would be similarly treated.

This is where the government and the unions would have matters stand for the duration of the strike or until the carrier either found replacement employees to work under the rates of pay, rules and working conditions applicable prior to the strike or pursued through the major dispute

processes of the Railway Labor Act proposed temporary changes in the collective agreement that would allow it to move stranded passengers, troops, mail, express, perishables and defense materials to destination or to connecting lines.

This bargaining requirement the government and the unions claim is imposed by the Railway Labor Act on a carrier which seeks to exercise its right to self-help in a strike situation presents an interesting picture. They are here contending that, despite the existence of a strike, the law compels a carrier to follow the major dispute provisions of the Act before making any changes whatever in working conditions established by collective agreements. They are thereby asking this Court to rule that a railroad with a strike on its hands cannot make temporary changes in working conditions as a part of its exercise of its right of self-help without first serving at least 30 days' notice of the intended changes on the striking unions and thereafter pursuing the prescribed steps of negotiation, mediation, and possibly arbitration or proceedings before an Emergency Board convened by the President under Section 10 of the Railway Labor Act. This would place the carrier in the position of seeking from the striking unions agreement upon measures to be utilized by the carrier in combating the strike. We confess to a certain skepticism about the carrier's prospects of success in such an undertaking.

The government and the unions are not alone in this extraordinary view. It was, in fact, adopted by the Court of Appeals, modified only to the extent that the court would allow a carrier to secure judicial consent to such limited departures from rates of pay, rules and working conditions contained in collective agreements as it could prove were "reasonably necessary" to make a "meaningful reality" of its right to exercise self-help. 336 F.2d at 182.

As the law now stands—at least in the Fifth Circuit—a carrier's right to resort to self-help in resisting a strike is limited to such departures from working conditions contained in collective agreements applied prior to the strike as a court determines are "reasonably necessary" to make a "meaningful reality" of the right to resort to self-help. 336 F.2d at 182.

Self-help is a right reserved, of course, to carriers and their employees alike. As the Court of Appeals observed in the suit by the Trainmen, the self-help to which employees resort is the strike, while that available to carriers is a right to operate or try to operate notwithstanding a strike. 336 F.2d at 181. The one is the corollary of the other. If the right of the carrier is to be restricted as the Court of Appeals has held, can it any longer be assumed that the employees' right to strike has no limits?

The essence of the employer-employee relationship is the employer providing the opportunity and the employee performing the work. The charter governing that relationship is the collective agreement contemplated and sanctioned by the Railway Labor Act—if, that is, the employees elect to bargain collectively. When the employee refuses to work in the course of his exercise of his right to strike he has gone as far as he can go towards breaching the employment relationship short of severing it altogether by resigning. In going on strike he rejects the collective agreement as an unsatisfactory charter for the employment relationship.

If a railroad employer is not to be permitted under the law to treat as completely but temporarily suspended a collective agreement which striking employees have rejected, is it not fair to inquire whether the law sanctions a total rejection of the collective agreement by striking

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employees? It may be that Section 6 of the Railway Labor Act, 45 U.S.C. § 156, forbids a union bent on exercising its right of self-help to ignore altogether its obligations under the collective agreement. Perhaps the law requires it to apply to a court for a determination of how far it must be authorized to avoid its obligations under the collective agreement in order to make a "meaningful reality" of its right to strike. A court might find that a complete cessation of work was not reasonably necessary. Instead, it might direct that refusal to work an hour or two a day, a day or two a week, or a week or two a month would be sufficient to make a "meaningful reality" of the union's right to strike.

We hasten to add that we do not believe this to be the law. But it should be if the decision of the Court of Appeals in the case at bar is affirmed by this Court.

We should also point to the doubt that the decision below may cast on the "right" of non-striking employees to refuse to cross the picket lines of their striking brothers. If the non-strikers have no dispute of their own on which the major dispute processes of the Act have been exhausted, how can they repudiate their own collective agreement by refusing to perform their regular duties? Is a lawful strike by one union to be considered a lawful excuse for all other employees to refuse to work? Nothing in the Railway Labor Act provides such an excuse. Perhaps under the law of the case at bar to date non-strikers must serve Section 6 Notices and pursue the major disputes procedures of the Act to seek temporary carrier agreement to their refusal to cross the picket lines of striking employees.

This analysis highlights another aspect of the law of this case to date that is curious at best. Collective bargaining agreements are, as we have pointed out, contracts. The Court of Appeals has ruled in this case that Florida

East Coast continues to be bound by all the provisions of a collective agreement despite the fact that the other parties to the agreement—the striking non-operating unions—have repudiated it. This unprecedented holding is framed against a back-drop of a lawful work stoppage by the striking unions. This is deceptive and may lend an unwarranted sense of reasonableness to the view that a carrier confronted by a strike continues bound by provisions of previously applicable collective agreements with striking unions. Based as it is on a very literal reading of a part of Section 6 of the Railway Labor Act, 45 U.S.C. § 156, this construction of the law should—if it is sound—apply whether or not the strike were lawful. This would mean that a railroad paralyzed by an unlawful work stoppage, against which—for one reason or another—it could not secure or did not want injunctive relief, would still be obligated to apply all of the working conditions contained in its collective agreement with the union engaged in the unlawful strike. This would be just one of the products of the construction of Section 6 advocated by the government and the unions, and adopted in part by the Court of Appeals.

L. Florida East Coast Experience Since Re-institution of Pre-strike Conditions Could Not Justify Construction of Railway Labor Act by Court of Appeals

We have not overlooked the fact that since October 30, 1964, Florida East Coast has actually been operating under pre-strike conditions, with minimal exceptions. This is no answer to our complaints. Nor does it mean that requiring a carrier to apply such working conditions in the face of a strike would not materially impede its exercise of its right of self help. By October 30, 1964, when it reinstated the old working conditions, Florida East Coast

had been operating under special temporary conditions for 21 months. By that time it had secured all the replacement employees it wanted.

What the experience of Florida East Coast in this respect does show—and all it shows—is that after 21 months of operating under temporary strike conditions the carrier was able somehow to restore pre-strike working conditions. It does not show that on February 3, 1963, or thereafter, the carrier could have resumed service if it had been required at that time to operate under pre-strike conditions. On the contrary, the uncontradicted testimony in the record reflects the enormous difficulties that would have confronted the carrier if it had been required to adhere to pre-strike conditions when it undertook to restore service in February 1963. (R. 303, 311, 329-330, 381-382, 389-390, 393-394.)

A study of the Annual Reports of the National Mediation Board discloses a number of railroad strikes each year. In almost all of these, it has been the practice for the carrier to try to operate despite the strike. With few exceptions, the strikes are so short that there is no opportunity to attempt to recruit and use replacements, but this has also been the practice in most strikes which extended beyond a few days.

Again bearing in mind that the general practice of the industry undoubtedly followed in most, if not all, of these strikes was precisely the same as that undertaken by Florida East Coast on February 3, 1963, we see that these strikes and the disputes underlying them were resolved in due course. This experience demonstrates that any apprehensions about weakening collective bargaining if carriers are not required to apply pre-strike working conditions are baseless.

VI. CONCLUSION

The Court of Appeals has introduced a new rule or concept into the field of labor relations in the railroad industry governed by the Railway Labor Act overturning a settled practice followed for many years. If permitted to stand this decision will seriously impair the delicate balance between carriers and their employees in the area of collective bargaining which it has been the policy of our national labor laws to establish and protect.

We respectfully submit that for all the reasons herein stated the decision of the court below should be reversed.

Respectfully submitted,

GREGORY S. PRINCE
PHILIP F. WELSH
Transportation Bldg.
Washington 6, D.C.

JONATHAN C. GIBSON
C. GEORGE NIEBANK, JR.
80 E. Jackson Blvd.
Chicago, Illinois 60604
Attorneys for Association of American Railroads Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief has this day been served on each party to this case by mailing copies thereof to the respective counsel of record at their post office addresses as hereafter listed, air mail postage prepaid.

Attorneys for the United States:

Honorable Thurgood Marshall
Solicitor General
United States Department of Justice
Washington, D.C. 20530

Honorable John W. Douglas
Assistant Attorney General
Civil Division
United States Department of Justice
Washington, D.C. 20530

Howard Shapiro, Esq.
Civil Division
United States Department of Justice
Washington, D.C. 20530

Walter Fleischer, Esq.
Civil Division
United States Department of Justice
Washington, D.C. 20530

William J. Hamilton, Jr., Esq.
Assistant U. S. Attorney
Main Post Office Building
Jacksonville, Florida

Attorneys for Florida East Coast Railway Co.:

William B. Devaney, Esq.
George B. Mickum, III, Esq.
Steptoe & Johnson
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

J. Turner Butler, Esq.
814 Florida Title Building
Jacksonville, Florida 32202

Attorneys for the Unions:

Lester P. Schoene, Esq.
Schoene & Kramer
1625 K Street N.W.
Washington, D.C.

Neal Rutledge, Esq.
Allan Milledge, Esq.
Richard L. Horn, Esq.
Rutledge & Milledge
601 Flagler Federal Building
111 Northeast First Street
Miami, Florida

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C. George Niebank, Jr.
Attorney for Association
of American Railroads,
Amicus Curiae